In The

Supreme Court of the United States

October Term, 1978

No. 78-988

I. MARCO L. LAURENTI, E. GIORGIO L. LAURENTI, LINDAR MANUFACTURING CORP., ROCKHILL CUTLERY, LTD., ROCKWELL CO.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners I. Marco L. Laurenti, E. Giorgio L. Laurenti, Lindar Manufacturing Corp., Rockhill Cutlery, Ltd., and Rockwell Co. (hereinafter collectively "petitioners"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 19, 1978 in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals is reported at 581 F.2d 37 (2d Cir. 1978). An oral opinion was rendered by the United States District Court for the Southern District of New York, and a transcript of that unpublished decision is reprinted in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1978. A timely petition for rehearing and suggestion for hearing *en banc* was denied on October 17, 1978. This petition for writ of certiorari is timely made. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and under the general supervisory powers which this Court exercises over the lower federal courts.

QUESTIONS PRESENTED

1. In failing to hold that §1604 confers upon defendants in criminal customs cases an enforceable speedy trial right, has the court below misconstrued the statute and usurped the legislature's prerogative?

2. Has the court below committed grave Constitutional error in holding that the extent or existence of due process protection depends upon the Government's decision to prosecute a case civilly or criminally?

3. In holding that §1604 confers no right upon defendants to a speedy adjudication of the claims against them, has the court below rendered unconstitutional the carefully drawn legislative scheme governing criminally-referenced customs seizure cases?

STATUTE INVOLVED

Title 19, U.S.C. § 1604:

> "It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises."

STATEMENT OF THE CASE

Petitioner I. Marco L. Laurenti is a principal of petitioner Lindar Manufacturing Corp. ("Lindar"),* a New York company engaged in the business of importing cutlery products from Italy for resale in the United States. In order to vitiate the effects of unreasonable price increases occasionally charged it by its foreign suppliers, Lindar compiled a substantial inventory in the United States which, by March 1975, was worth in excess of $800,000. Approximately three-fourths of this merchandise was stored in Lindar's New York premises, and the remainder, consisting of goods which had not yet cleared customs, placed in a bonded warehouse in Newark, New Jersey.

On March 24, 1975, a former Lindar employee informed officials of the United States Customs Service ("Customs") that petitioners were importing goods under false invoices and provided them with a thick package of documents allegedly substantiating his claim. Based upon this information, a warrant for the search of Lindar's offices was issued and executed on March 26, 1975 by some nine or ten Customs agents. Pursuant to this operation, all of Lindar's inventory then in its possession was seized along with a substantial quantity of its books and records. Approximately one month later Customs seized Lindar's merchandise stored in the New Jersey warehouse together with approximately 600 file folders belonging to the company's customs broker.

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* Petitioner E. Giorgio L. Laurenti, Marco's brother, is no longer employed by Lindar. Petitioner Rockhill Cutlery, Ltd. is a wholly-owned subsidiary of Lindar established in 1973 and Rockwell Co. its nominal predecessor.

Although no formal civil or criminal proceedings had been commenced against petitioners,* all attempts to retrieve any portion of the seized property, whether through negotiations with Government authorities or through application to the Court, were rebuffed.** Despite the fact that this merchandise was essential to petitioner's ability to conduct its business, release was impossible because it is Custom's established policy to defer any action on the "civil" side of the case, including administrative mitigation proceedings, see 19 U.S.C. §1618, and forfeiture action, until a pending criminal prosecution has been completed. In order to mitigate under 19 U.S.C. §1618, the owner of the goods must "cooperate" with Customs; he must, by definition, submit a lengthy and detailed statement as to the facts of the controversy and give oral testimony, see 19 C.F.R. §§171.1(b) (4), 171.11(c) (3). Thus, to recover goods following a Customs seizure, a potential criminal defendant would be required to waive his Fifth Amendment rights.

* The fraudulent importation of noncontraband merchandise is punishable by two penalties, civil forfeiture and criminal prosecution. Under 19 U.S.C. §1592 the United States Attorney may commence a civil action for forfeiture of merchandise which has been seized under 19 U.S.C. §1591; if there has been no seizure, a money judgment may be entered in the forfeiture action against the importer for the full value of the merchandise fraudulently imported. This onerous forfeiture penalty may be mitigated pursuant to 18 U.S.C. §1618, which authorizes Customs (the "Secretary of the Treasury") to settle the case administratively in an amount less than the full forfeiture penalty, usually a multiple of the revenue lost by the Government. In addition to imposing the forfeiture penalty, Customs may decide to recommend to the United States attorney that the importer be prosecuted criminally under 18 U.S.C. §542. The same conduct proscribed in the civil forfeiture provision, 19 U.S.C. §1592, is made criminal in 18 U.S.C. §542. When a criminal investigation commences, all civil aspects of the case, including mitigation proceedings, are deferred until the conclusion of the criminal prosecution. See generally, 19 C.F.R. §§171.1(b) (4), 161.2(a).

** In October 1975, petitioners did succeed in negotiating with Customs for the release of a small quantity of goods on condition that they post letters of credit for the value of the merchandise as appraised by Customs. The remainder of the goods seized are, at this date, still in the possession of the Government.

On June 11, 1975, Customs informed petitioners that they were being charged with fraud. Although the United States Attorney for the Southern District of New York had taken charge of the matter from the outset, excepting some perfunctory proceedings, that investigation did not commence in earnest until some thirteen months after the original massive seizure, and only then in response to a court directive. In April, 1976, the Laurentis were arrested in New York City upon a criminal complaint charging them with conspiracy to import goods under false invoices in violation of 18 U.S.C. §542.* Despite the lengthy interval between the original seizure and these arrests, the warrants were based on no evidence which had not been conveyed to Customs in March of the preceeding year.

Although the Laurentis had already suffered a confiscation of $800,000 worth of inventory, the Assistant United States Attorney at their arraignment asked for and received from the presiding magistrate cash bail for each in the amount of $75,000. At a subsequent hearing, a district judge reduced this to $25,000 and in view of the fact that petitioners had been deprived of their property for over fourteen months, warned that even these restrictions would be dropped if an indictment was not handed up by mid-July of that year.

Acting under this stricture, the grand jury on July 15, 1976, some sixteen months after the original seizure of petitioners' inventory, returned a 71 count indictment. Count 1 charged petitioners with conspiracy, contrary to 18 U.S.C. §371, to violate 18 U.S.C. §542, relating to the entry of goods into the United States by means of false statements and 18 U.S.C. §1001** relating to false statements generally. Counts 2 through 36 and 37 through 71 charged substantive, parallel violations of 18 U.S.C. §§542 and 1001, respectively. The charges in the indictment relate to invoices which cover less than fifteen percent of the goods seized.

* The statute in pertinent part is set forth at 581 F.2d at 39 n.5.
** The statute in pertinent part is set forth at 581 F.2d at 39 n.6.

Citing the unwarranted sixteen month delay between the execution of the search warrant and the return of the bill, petitioners on October 12, 1976 moved to dismiss the indictment based upon the deprivation of their rights to a speedy trial as guaranteed under the Fifth and Sixth Amendments to the United States Constitution, and under 19 U.S.C. § 1604. That statute, part of the Tariff Act of 1930, ch. 497, § 1604, 46 Stat. 754, is part of a scheme which seeks to obviate the due process objections inherent in a procedure which deprives a person of his noncontraband property without a hearing. This legislation consequently mandates that the Customs officer effecting the seizure "immediately" report this to his superior, 19 U.S.C. § 1602,* and where either a civil forfeiture action or criminal prosecution contemplated, inform the United States attorney of this action together with all known facts relevant to the averred violation, 19 U.S.C. § 1603.**

Upon notice of the seizure, the United States attorney must, under 19 U.S.C. § 1604 ("§ 1604") "immediately" investigate the case, and if legal action is indicated, he is obligated to "forthwith" cause the proper proceedings to commence and to prosecute same "without delay".

On November 14, 1977, following an evidentiary hearing during which the testimony established that the Government was unaware of its duties under § 1604, the district court, per Hon. Thomas P. Griesa, held that the statute was applicable to

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* In pertinent part, 19 U.S.C. § 1602 provides:
"It shall be the duty of any officer, agent . . . to report every such seizure immediately to the appropriate customs officer for the district."

** In pertinent part, 19 U.S.C. § 1603 provides:
"Whenever a seizure of merchandise for violation of the customs law is made, . . . and legal proceedings by the United States Attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States Attorney for the district . . . and to include in such report a statement of all the facts . . . in which reliance may be had for forfeiture or conviction."

criminal cases and that it had been violated by the Government's unjustified failure to act upon a charge of customs fraud over a sixteen month period following the seizure of petitioners' inventory. Without addressing the claims of deprivation of Constitutional rights, and without making an explicit finding on the issue of whether petitioners had been prejudiced in their ability to mount a defense to the criminal charges owing to this tardy prosecution, the court ordered the indictment dismissed. The United States Attorney's motion for partial reargument was denied.

The Government appealed pursuant to 18 U.S.C. § 3731, and the Court of Appeals for the Second Circuit reversed, *United States* v. *Laurenti*, 581 F.2d 37 (2d Cir. 1978), holding that § 1604 was not to be given literal application in the criminal context, but understood merely as an internal Government fiat underscoring, for the benefit of United States attorneys, the importance of their prosecuting customs fraud cases in their respective bailiwicks. The opinion assumes, as the district court held, that the statute is applicable in criminal prosecutions and that it was violated by the belated indictment eventually returned. The court refused to find, however, that the Government's disregard of § 1604 is in any way redressable by a defendant in a criminally referenced customs fraud case.

This conclusion is premised not upon any textual or judicial authority, or upon any pertinent legislative history. Rather, it is based on the appellate court's own belief that had the authors of § 1604 intended such a result, they would have incorporated specific time limits into the statute and expressly provided dismissal as the penalty for violation thereof. The holding is additionally buttressed by "policy considerations of high moment", 581 F.2d at 43, namely, that discretion to prosecute not be hastily exercised and concern that literal application of the statute would require that customs fraud cases be given undue priority in federal prosecutor's offices.

Petitioners' motion for rehearing and suggestion of hearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

1. In Failing to Hold that § 1604 Confers upon Defendants in Criminal Customs Cases an Enforceable Speedy Trial Right, the Court Below has Misconstrued the Statute and Usurped the Legislature's Prerogative.

The procedure of summary seizure under the customs laws has grave and potentially disastrous economic consequences for the owner of seized goods. Not only does he lose immediate use of the seized goods, thereby precluding compliance with existing contracts, but where the goods are subject to deterioration or obsolescence in storage, their inherent value may also disappear. If due process of law means anything in our free society, it is that the Government does not have unfettered authority to destroy an individual's business and livelihood under the guise of conducting a criminal investigation. Thus, where the Government opts to initiate a criminal investigation of a violation of the customs laws by seizing a person's non-contraband business property it must in fairness conduct and complete that investigation and prosecution as expeditiously as possible in order to provide the owner with a prompt day in court to demonstrate his innocence and thereby obtain return of his property. In the circumstances of a customs seizure, the procedural protections of the Fifth and Sixth Amendments have been specifically embodied in the Tariff Act of 1930 which contains specific provisions obligating the Government to prosecute such cases expeditiously, 19 U.S.C. § 1604.

Fundamental to an understanding of § 1604 is an appreciation of the unique problem it was meant to redress. Customs seizures are unlike comparable police operations in that the objects gathered are not contraband or the instrumentalities of a crime, or for the most part, evidence themselves of the commission of a crime. The essential purpose of a customs seizure is to provide collateral or security for a money penalty which may be subsequently due and owing upon the Government's ability to demonstrate that a defendant's conduct has violated the law.

The targets of these customs confiscations lack any measure of pre-seizure protection. Where the aggrieved party is referred to the United States attorney for criminal prosecution, neither is there an opportunity for post-seizure relief. This is because the remission of goods held for customs forfeiture is deemed a civil proceeding which, under customs regulations, are stayed pending adjudication of the criminal charges. Release of the seized items in this situation is possible only through "cooperation", with the Government which, in operation, is the equivalent of a waiver of the Fifth Amendment right against self-incrimination. Thus, a criminally-referenced customs action, which may actually destroy a person's business and livelihood, is subject to no administrative procedure to mitigate the damage it may cause, nor is it judicially reviewable for unreasonableness.

In recognition of the Constitutional dimensions of this problem, Congress early on enacted as procedural safeguards the forbears of the present §§ 1602-1604. The mission of these statutes then, and as envisioned by the draftsmen of the Tariff Act of 1930 where they are presently codified, was plainly to invest the victims of customs seizures, especially when they are targets of an impending criminal prosecution, with a necessary procedural protection—a statutory guarantee that the claims against them will be handled expeditiously.

This desire for prompt prosecution in customs cases was explained in the early case of *In re District Attorney (United States v. Bliss)*, 23 Fed. 26 (E.D. Mo. 1885), which construed one of the statutory predecessors to the present § 1604 as it related to the payment of fees to the prosecutor for criminal prosecution under the customs laws. That particular provision is no longer in effect but the statute was very similar to the present § 1604 in that it required the collector to report a customs law violation or seizure to the United States District Attorney and also required prompt prosecution by him. The Court observed that the rationale for the expediting statute was that unlike the typical criminal prosecution which was com-

menced by the United States District Attorney and carefully scrutinized from the outset by the courts to insure that the defendant was not being unjustifiably prosecuted, in customs cases, the effective prosecution of the suspected violator (including the seizure of his goods and imposition of penalties) was commenced and carried out by the customs collector outside of the scrutiny of the courts, see 23 Fed. at 27.

Thus, to prevent the arbitrary punishment of importers under the customs laws (as for example by the seizure and retention of their goods for almost two years without according them an opportunity to prove their innocence), statutes comparable to the present § 1604 were enacted in the early Tariff Acts. The present situation might well have been in mind when the district court noted above observed that prior to the enactment of such expediting statutes (23 Fed. at 27),

> "[I]t often happen[ed] that the innocent, when acquitted, suffer[ed] more than the guilty."

The Second Circuit acknowledges that § 1604 is mandatory as applied to civil proceedings, and that its contravention in those cases will result in the termination of the forfeitures sought, 581 F.2d at 41-42 n.15. Furthermore, in accordance with the legislative history and derivation of the statute,* the opinion assumes that § 1604 is applicable to criminal customs cases, and that as such, it was violated by the Government's conduct in this case. The Court refused to hold, notwithstanding these factors, that the violation of § 1604 in a criminal customs case gives rise to an enforceable right to have the charges dismissed.

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* The origins of § 1604 indicate that it was intended to provide relief to persons charged with criminal violation of the customs law. Its predecessor was Section 7 of the Act of July 18, 1866, ch. 201, 14 Stat. 178 (1866), a statute which this Court deemed "strictly penal", *Stockwell* v. *United States,* 80 U.S. (13 Wall) 531, 551 (1871). Moreover, the only other court to consider the issue held that violation of § 1603 was redressable by dismissal of the indictment, *United States* v. *Browning, Inc.*, No. Cr. 76-46(3) (D. Utah 1976), *rev'd on other grounds,* 572 F.2d 720 (10th Cir.), *pet. for cert. filed,* 46 U.S.L.W. 3710 (U.S. May 16, 1978) (No. 77-1576).

The rationale supporting this result is somewhat opaque. Citing the fact that § 1604 contains no explicit timetable or expressly provides the sanction to be applied for its violation, the court below contends that the remedy of dismissal of an indictment was not intended by the law's draftsmen. Justifiably loathe to rely solely upon this line of argument, the Second Circuit then announces what, in effect, is the true basis for the decision: "policy considerations of high moment," 581 F.2d at 43. In overriding Congress' intent to make § 1604 fully enforceable in criminal customs cases through the promulgation of "policy", the court below has encroached upon the law-making function of the legislature.

A. The Unexpressed Language of § 1604 and Legislative Intent

Although the text of the statute requires the United States attorney to *immediately* inquire into the facts of cases referred to him by the Customs Service, and to *forthwith* institute appropriate proceedings *without delay,* the court below is less impressed with these explicit commands than with what is not expressly stated: a detailed timetable, much like that of the Speedy Trial Act, see 18 U.S.C. §§ 3161, *et. seq.*, in which the federal prosecutor must act, on pain of having an indictment dismissed. The court further notes that seemingly mandatory language is not always to be given literal interpretation, citing in support of that observation the construction of a purportedly analogous provision of the bankruptcy law by a federal district court. The suggestion is then hazarded that the legislature's true concern in drafting a provision requiring prompt disposition of customs cases was not really to accord some measure of due process to persons whose goods have been seized, but to aid in the quick recovery of customs duties, which were at the time of the statute's earlier enactments a principal source of this nation's revenues.

These contentions are hardly persuasive. With respect to the absence of timetables and sanctions, it should be noted that

the speedy trial guarantees of the Fifth and Sixth Amendments to the United States Constitution possess no such features, and yet their violation in criminal cases will be redressed by the dismissal of charges.

Similarly, other "speedy trial" statutes, including those found in Title 19 of the United States Code have been held to have implicit timetables. In *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363 (1971), this Court read into 19 U.S.C. § 1305(a) a requirement that the Government initiate judicial proceedings within fourteen days of the seizure of allegedly obscene materials, else the case would be terminated and forfeiture denied. While that decision was prompted in part by the First Amendment implications of seizing books and movies without a prior hearing, other federal appellate courts have held it relevant to the confiscation of other property, *States Marine Lines, Inc.* v. *Shultz,* 498 F.2d 1146, 1154 (4th Cir. 1974).

More importantly, the notion that it was not Congress' intent to make violations of § 1604 actionable through dismissal of the case is belied by the fact that every appellate court which has considered the matter has applied such a sanction in civil customs cases, see, e.g., *United States* v. *One 1970 Ford Pickup,* 564 F.2d 864 (9th Cir. 1977); *United States* v. *One Motor Yacht Named Mercury,* 527 F.2d 1112 (1st Cir. 1975); *States Marine Line, Inc.* v. *Shultz, supra; Sarkisian* v. *United States,* 472 F.2d 468 (10th Cir.), *cert. denied,* 414 U.S. 976 (1973).

The legal argument advanced by the Second Circuit fails to explain how the statute when applied to civil cases can result in the dismissal of a forfeiture, and yet have no such effect in a criminal case where the remedy sought is the dismissal of the indictment. It cannot be seriously contended that it was the *legislature's* intent to create a statute the force and effect of which was to differ depending on whether it was invoked in a criminal or civil case. Given the predominantly penal ancestry of § 1604, it cannot realistically be urged that although this statute arose in a criminal context, its framers did not intend that it would be enforceable in criminal cases. Moreover,

insofar as the opinion below intimates that § 1604 creates no "private right of action" for defendants adversely affected by a customs seizure since it was intended as an aid to the Government in its collection of revenue, see 581 F.2d at 40-41 n.12, 43, it should be noted that dismissal of a civil customs case pursuant to the statute deprives the Treasury of its due every bit as much as if the case were maintained as a criminal action. Yet, it could hardly be argued at this late date and in view of the extensive authority to the contrary that defendants in civil forfeiture proceedings have no standing to object to prosecutorial tardiness because § 1604 was not enacted for their "especial benefit", see *Cort* v. *Ash,* 422 U.S. 66, 78 (1975).

The court below claims to find support for its view in *United States* v. *Filiberti,* 353 F. Supp. 252 (D. Conn. 1973). There, the district court construed a purportedly analogous bankruptcy statute and held that seemingly mandatory speedy trial language therein need not have been made enforceable through dismissal of an indictment. The statute at issue, 18 U.S.C. § 3507,* requires any referee, receiver or trustee to report to the United States attorney all facts supporting a belief that fraud has been committed with respect to the assets being administered. The prosecutor is in turn required to determine "without delay" if probable cause exists to support such a belief.

There are salient differences between 18 U.S.C. § 3507 and 19 U.S.C. § 1604, not the least of which is that the latter has, in its civil applications, been held to authorize the dismissal of cases where it has been offended by the Government's conduct. More to the point, in bankruptcy frauds, the persons to be charged have suffered no prior deprivation of property and thus, unlike persons suffering from a massive customs seizure, their plight has no Constitutional implication. There is not, as in the present case, any purpose to be served by compelling the Government to act more quickly than required by the statute of limitations.

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* The statute is set forth at 581 F.2d at 42 n.16.

It may well be that there are isolated instances where mandatory language, even when found in a statute of the United States, does not give rise to an enforceable right. It is equally true, however, that Congress does not generally engage in empty phrasemaking or mere sloganeering, and its plain language may never be ignored with impunity where, as in the case at bar, compliance with its commands is necessary for the fulfillment of the statute's underlying purpose, see, e.g., *Scott* v. *United States*, ____ U.S. ____, 98 S. Ct. 1717 (1978) (apparently mandatory language in statute requiring minimization of wiretaps *not* given literal application precisely in order to effect the statute's objective).

B. "Policy Considerations of High Moment"

The real basis for the result reached by the appellate court is its own assessment of policy which it feels weigh in favor of denying criminal defendants the speedy trial guarantees of § 1604. This is, upon scrutiny, solicitousness for federal prosecutors, and more particularly, a hesitancy to allow the exercise of their discretion to be goaded and a fear that literal adherence to the statute will cause customs cases to be given undue priority. The opinion recognizes parenthetically that in elevating these concerns, it dictates the anomalous result that defendants in criminal customs cases will be deprived of procedural protections granted to defendants in civil customs cases. The illogic of this position is excused on the grounds that the indictment, with its attendant "stigmatization", 581 F.2d at 42 n.15, is more serious than mere civil charges and that it may be to the defendant's ultimate advantage if the prosecutor's deliberations are not hurried.

There could hardly be a better illustration of why courts should defer to the legislature in matters of policy. The court below overlooks the fact that the very purpose of the statute is to require prosecutors to act with utmost speed, owing to the due process problems inherent in a scheme which has mandated a Government seizure without providing for a pre- or

post-seizure hearing. The statute also reflects Congress' belief that a massive customs seizure, which may prevent an importer from meeting his contractual obligations, and may destroy his business, "stigmatizes" its victim more than the filing of criminal charges, and is fully the equivalent of an arrest or indictment.

Congress, fully aware of these concerns, made a judgment that customs cases initiated by seizure be developed and resolved with dispatch. This legislative determination has now been superceded by the court below, which has simply substituted its own conflicting judgment for that of the Congress. This Court should issue the Writ in order to correct the erroneous construction placed upon § 1604, to discourage judicial revision of similar statutes, to vindicate the significance traditionally accorded to a statute's language and legislative history, and to reaffirm the deference which must be paid to the legislature as the law-making branch of our Government.

2. The Court Below has Committed Grave Constitutional Error in Holding that the Extent or Existence of Due Process Protection Depends upon the Government's Decision to Prosecute a Case Civilly or Criminally

In exalting its own concerns over those that motivated the Congress to enact § 1604, not only has the court below encroached on the legislature's rightful domain, but the policy it promulgates is based on a dangerous, if unarticulated, premise. This is, that due process considerations concerning Governmental deprivation of property, which must attach in civil proceedings, may be diluted if not altogether evaporated when that same case takes on a criminal hue. In other words, the court below presumes that when a proceeding is denominated as "criminal", the Government's interest somehow becomes weightier and the individual's somehow less significant. Thus, although the underlying conduct is the same, the transformation of a case from a civil to a criminal proceeding in the Second Circuit's view, requires a readjustment in the Con-

stitutional balance of interests between state and individual. In this manner, procedural safeguards which in the civil context are deemed essential, become outweighed by the compelling interest of the Government in enforcing the criminal law.

That this notion is at the heart of the decision below is manifest at footnote 15, 581 F.2d at 41-42 n.15, wherein the court attempts to explain how statutory language which is mandatory in the forfeiture setting becomes merely hortatory when applied to criminal cases. This is because ". . . considerations unique to criminal proceedings" are implicated which validate and excuse deprivations which would otherwise be Constitutionally "intolerable".

It is submitted that our deeply held notions of due process are not so chimerical; they cannot be altered, varied or, as in the present case, banished altogether through the arbitrary decision of a Government bureaucrat to deem a case "criminal" rather than "civil". Moreover, this outlook of the court below is fraught with potential for abuse and should not be countenanced for three reasons. First, the holding of the Second Circuit is contrary to this Court's dictate that one who is to suffer a penalty for a crime is entitled to greater procedural safeguards than one who is merely a party to a civil suit, *Speiser* v. *Randall,* 357 U.S. 513, 524-25 (1958). As previously noted, the decision below decrees that persons to be charged criminally are to be denied rights which they would enjoy had the case been pursued civilly.

Second, the holding, if it is allowed to stand, will operate to prejudice defendants in civil customs cases since the Government now has a loophole to avoid prosecuting forfeiture cases promptly. It may simply term a case "criminal" and proceed with its investigation at a leisurely pace, thereby flouting the statutory scheme without risking the civil sanction of dismissal which is now routinely imposed for Government inaction.

Finally, the differing procedural rights which persons are to be accorded depending on the label to be applied to their case could intrude upon the very prosecutorial discretion which the

court below so assiduously wishes to immunize from extraneous influences. The perception that it is easier to pursue a customs violation criminally, unencumbered by any due process restraint, may lead the Government to seek indictments where, all else being equal, they might otherwise have sought a civil forfeiture. Rather than shielding the process from outside pressures, the decision of the court below imports into the decision-making process a very significant consideration.

The Writ should issue to correct the fundamental misconception which lies at the heart of the Second Circuit's opinion, and which is so ominous in its implications and so potentially destructive of the proper administration of the customs laws.

3. In Holding that §1604 Confers No Right Upon Defendants to a Speedy Adjudication of the Claims Against Them, the Court Below Renders Unconstitutional the Carefully Drawn Legislative Scheme Governing Criminally-Referenced Customs Seizure Cases

This Court has held and repeatedly reaffirmed that a deprivation of property for any period of time pending a final order or judgment rises to a Constitutional deprivation if it is unrestrained by an appropriate due process device, *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). While pre-seizure notice and the opportunity to be heard are preferable, it has been recognized that there exist "extraordinary" situations, including forfeiture proceedings, where these safeguards are not Constitutionally required, see, e.g., *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). However, it has never been suggested that these extraordinary circumstances are entirely without the ambit of due process, and while that concept may be flexible in its application to differing situations, *Board of Curators of the Univ. of Mo.* v. *Horowitz,* U.S. , 98 S.Ct. 948 (1978), some measure of protection must attach to customs seizures. Indeed, the massive confiscation of an individual's inventory demands some restraint since to a degree unknown to other

deprivations of property, it has the capacity to destroy a person's livelihood, and by so doing, drain him of the resources necessary to defend himself against the Government's accusations.

Under the legislative scheme set forth in Title 19, the victim of a criminally-referenced customs seizure cannot realistically institute any action for the return of his property since those proceedings are civil in nature, and under customs regulations, all civil proceedings are held in abeyance where referral to the United States attorney is contemplated. Under this circumstance, an aggrieved party might be able to obtain the release of his goods, but only by submitting to Government inquiry—tantamount to a waiver of one's Fifth Amendment rights against self-incrimination—in which case that person will lose the ability to mount any credible defense to the pending or future criminal charges. The only protection one may cling to in this situation is the statutory guarantee that Government authorities will investigate the matter promptly and that a quick disposition of all claims will be made.

The holding below strips defendants of their only due process protection—the only provision which operates to mitigate the harsh effects of the taking. Other courts have recognized that in the absence of this speedy trial guarantee, the scheme may well run afoul of the Due Process Clauses of the Fifth and Fourteenth Amendments. For example, in affirming the district court's dismissal of a case seeking forfeiture of a vehicle for unjustified delay in violation of 19 U.S.C. § 1603, the Ninth Circuit noted in *United States* v. *One 1970 Ford Pickup, supra,* 564 F.2d at 866: ". . . [I]f reasonable time limitations are not placed upon the application of §§ 1602-1604, a question of the Constitutionality of the statute could be raised." Indeed, the Government itself has elsewhere argued that the time limits inherent in §§ 1602-1604 apply to, and serve to validate, other forfeiture provisions of the Customs Code which might otherwise violate the Constitution, *United States* v. *Thirty-Seven Photographs, supra,* at 368 n.2.

The effect of the Second Circuit's decision will be to encourage prosecutorial procrastination since the pressure on defendants to capitulate is made more intense by inaction than by the threat of a quick trial which, even if it results in conviction, at least holds out the prospect of a return of the confiscated goods. This Court has not hesitated to invalidate schemes which encourage such Governmental dawdling, the effect of which is to damage the aggrieved party as severely as an adverse judgment on the merits, see, e.g., *Teitel Film Ciro.* v. *Cusack,* 390 U.S. 139 (1968); *Freedman* v. *Maryland,* 380 U.S. 51 (1965), or to read into them reasonable time limits so as to avoid declaring them unconstitutional, see, e.g., *United States* v. *Thirty-Seven Photographs, supra.*

Moreover, in a long line of cases beginning with *Garrity* v. *New Jersey,* 385 U.S. 493 (1967), this Court has held unconstitutional statutes which compel an individual to waive his right to remain silent under threat of economic sanction, see *Lefkowitz* v. *Turley,* 414 U.S. 70 (1973); *Uniformed Sanitation Men Ass'n* v. *Commissioner,* 392 U.S. 280 (1968); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); *Spevack* v. *Klein,* 385 U.S. 511 (1967). The customs statutes and regulations noted previously, which require "cooperation" by the owner of the seized goods are similar in operation to the statutes struck down in the aforementioned cases in that they condition remission of forfeiture on waiver of the privilege against self-incrimination. A similar fate must befall this legislative scheme now that the court below has removed the only due process protection available to victims of customs seizures.

The ability of the Government to keep property for an indefinite period without affording the owner a hearing, and further, its ability to utilize this deprivation to pressure defendants into plea-bargaining is Constitutionally intolerable, both as a patent violation of well established notions of procedural due process and because it places defendants in an untenable position in their dealings with prosecuting authorities. The Writ should issue so that this Court may give § 1604 its proper effect,

and in so doing, restore the proper balance between prosecutors and defendants and give some semblance of due process to the customs seizure scheme.

CONCLUSION

For the above reasons, the petition for Writ of Certiorari should be granted.

Dated: December 15, 1978

Respectfully submitted,

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APPENDIX

Opinion of the United States District Court, Hon. Thomas P. Greisa

THE COURT: All right, I don't need that. Let me put my ruling on the record.

The defendants have moved for dismissal of the indictment. There have also been motions by one or more defendants to suppress certain evidence and for severance of the trial or for severance from the trial of other defendants. The motions to dismiss the indictment is granted. The motions for suppression of evidence and severance are denied as moot.

The dismissal of the indictment is based upon Section 604 Tariff Act of 1930 which is codified in 19 United States Code, Section 1604. This reads in pertinent part as follows:

> "It shall be the duty of every United States Attorney immediately to inquire into the facts of the cases reported to him by collectors and the laws applicable thereto, and if it appears probable that any fine, penalty or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States District Court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted without delay for the recovery of such fine, penalty or forfeiture in such case provided unless upon inquiry and examination such United States Attorney decides that such proceedings cannot probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he will report the facts to the Secretary of the Treasury for his direction in the premises."

There has been very substantial legal briefing regarding the interpretation of Section 1604. The principal point of contention has been whether the statute applies to criminal proceedings such as the present one or simply to civil proceed-

ings. The Government contends that the statute applies only to civil proceedings. The defendants contend it applies both to civil proceedings and criminal proceedings.

I hold that the statute applies both to civil and criminal proceedings and specifically to the present criminal indictment.

The principal device for interpreting this statute has been the tracing of the legislative history of this statute which was done in supplemental briefing by all counsel. Now, the legal materials which have been submitted to the Court contain the history of this statute going back to its predecessors all the way to the first Customs statute in 1789. While all of this material has been helpful to me, I do not find it necessary to summarize the full extent of the material for the sake of my ruling now. It is sufficient to go back simply to the Tariff Act of 1930 and note a few points.

I should elaborate a little further on the Government's argument. The Government argues that the phrase "fine, penalty or forfeiture" does not specifically state or include the words "criminal prosecution or prison term," or other things which Government believes would be necessary for the statute to cover criminal prosecutions.

The Government further contends that "penalty" in the context of the related statutory provisions clearly means civil penalty. The Government contends that "forfeiture" refers to civil penalties under the Customs statute. Basically the Government contends that the word "fine" is simply surplusage.

It should be noted that as of the present time the criminal statute is not contained in the Customs statutes in Title 19. The criminal statute, which is the main focus of the indictment, is contained in the Criminal Code. Specifically it is Title 18, United States Code, Section 542, and as I have stated already, there is no criminal prosecution provided in Title 19. Therefore if we simply look at the surrounding statutes on either side of 19 USC 1604 we indeed do not find criminal sanctions. We simply find a variety of civil sanctions relating to penalties, forfeiture and so forth.

However, if we do go back to the Tariff Act of 1930 the situation is different. The Tariff Act of 1930 contained both criminal sanctions and civil sanctions. Section 591 of the 1930 statute is entitled "Fraud-Personal Penalties," and it provides for the criminal sanctions for fraudulent importation of goods in violation of the Customs laws. It provides for a fine up to $5,000 and a prison term not exceeding two years.

Section 592 of the Tariff Act of 1930 is entitled "Same-Penalty Against Goods," and it is one of the statutes providing for civil penalties.

Section 604 of the Tariff Act of 1930 is basically identical to the present statute we are dealing with contained in Title 19 and labeled in that Code Section 1604. But it is perfectly clear that in the Tariff Act of 1930 the phrase in Section 604, "fine, penalty or forfeiture"—it is clear that this phrase referred both to Section 591, the criminal section, and also to the civil penalty sections, forfeiture sections, including Section 592.

Now, in 1948 the criminal section was repealed and in effect moved to the new Criminal Code in Title 18; that is, Section 591 of the Tariff Act of 1930 was repealed and the criminal section was moved to Section 542 of the Criminal Code.

However, the revisors and codifiers made it expressly clear that this did not involve any change of substance. The revisors specifically stated:

> "Any right or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

Thus it is clear to me that Section 1604 of Title 19 presently in effect refers to both criminal prosecutions and to civil penalty proceedings, and I so hold. This means that the Government in connection with the present prosecution was under the mandate to follow Title 19, United States Code, Section 1604.

Taking the language bit by bit, the first obligation on the part of the United States Attorney is to immediately inquire into the facts of cases reported to him by collectors. Now, this report by a Customs Collector refers back to Section 1603 of Title 19 which provides:

> "Whenever a seizure of merchandise for violations of the Customs laws is made or a violation of the Customs laws is discovered and legal proceedings by the United States Attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States Attorney for the District in which such violation has occurred or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge with the names of witnesses and the citation to the statute or statutes believed to have been violated and on which reliance may be had for forfeiture or conviction."

When the two statutes are read together it means, first, that the Customs officer must report a probable violation to the United States Attorney. The United States Attorney must immediately inquire into the facts reported to him and if it appears probable that a violation has occurred and that proceedings should be instituted, the United States Attorney's office must forthwith cause proper proceedings to be commenced and prosecuted without delay.

The first contention of the Government which should be dealt with relates to when it was that the report under Section 1603 occurred. The Government contends that this report was a document dated June 28, 1976, a 10-page letter addressed to the United States Attorney by the Senior Special Agent in charge of the investigation, Donald S. Donohue.

The Government contends that the indictment was returned promptly after the sale of this report.

The second contention of the Government is that even if the report should be deemed to have occurred at some earlier time, nevertheless the United States Attorney's office acted with sufficient promptness to comply with the statute.

Now, the chronology is as follows, very briefly:

The first event in the case occurred in mid-March, 1975 when Customs agents came to the United States Attorney's office and requested assistance in obtaining a search warrant directed to the defendant Lindar.

The search warrant was granted on March 25, 1975 and it was executed on March 26, 1975. Pursuant to the search warrant or warrants approximately $800,000 worth of goods were seized and some 35 or so cartons of documents were seized from the premises of Lindar.

It appears that the seizure was occasioned by the fact that an employee or former employee of Lindar came to the Customs people and stated to them that by virtue of a fraudulent documentation system which was engaged in and created by the defendants, the result was that large amounts of cutlery consisting of scissors and other items had been imported into the United States from Italy and perhaps other European countries on the basis of declarations which understated the value of the goods and resulted in the payment of insufficient duties.

It appears that this employee advised the Customs agents of this situation and that certain documents were provided to the Customs agents, and this led to the seizure of March 26, 1975.

The matter was put in charge of an Assistant United States Attorney by the name of John Bush. Special Agent Donohue was in charge of the matter from the Customs end and these two men worked together on the case until an indictment was finally filed on July 17, 1976.

We have had a lengthy hearing in which a detailed chronology of events has been furnished to the Court and I will not attempt to analyze or summarise that in detail.

I rule that the report required and contemplated by Section 1603 is not the report dated June 28, 1976. Indeed Customs Agent Donohue testified that the report was not finally approved in the Customs service, and was not signed until June 7. For some reason, the report was not received by the U.S. Attorney's Office until early August—after the indictment had been filed. To say that this report triggered the time requirements of Section 1604 would be an absurdity, and would result in a gross violation of both the spirit and the letter of the statute and its intention to require prompt proceedings by the Customs Department and the United States Attorney's Office in the case of Customs violation.

The record clearly shows that within a matter of weeks after the initial proceedings on March 25, 1975 the United States Attorney's Office and the Customs Department both believed that there was virtually overwhelming evidence of Customs violation. They had sufficient documents in hand to form that judgment. They knew that the case to be made in court would depend very largely on the documentary evidence plus a limited number of witnesses and they had formed the judgment that probably the witness who had originally informed them would be the principal Governement witness. But the basic thing was the main case here rested on a comparison of different sets of documents and certain highly incriminating letters which they had in their hands at least within a matter of weeks after the March 25th events.

At the hearing of November 10, 1977 Mr. Bush made it plain that he did not rely on the report of June 28, 1976 to trigger his investigation. Indeed he was barely familiar with the report, and remarked that "a number of agencies sometimes send over things like that."

I hold that the inquiry of the United States Attorney's office, within the meaning of Section 1604, commercial in March 1975. The next question is whether the subsequent proceedings were taken in accordance with the dictates of that statute.

Customs Service and the United States Attorney's office proceeded in a way that could not be criticized in any fashion if it were not for the mandate of Section 1604, but the salient factor is that the Assistant United States Attorney in charge of this case has admitted that he did not know of, or consider in any way, the requirements of Section 1604.

It is impossible to believe that the Government would not have acted in a far more expeditious fashion if they had known of the mandate of Section 1604 and considered how to comply with it.

A few salient facts about the proceedings between March, 1975 and July 1976 should be brought out. The Government argues and has presented evidence attempting to explain the delay between March 25, 1975 and the time of the indictment in July, 1976. One of these explanations, and perhaps the principal one, is that the preparation of the case for the grand jury involved an analysis of a vast number of documents contained in the 35 cartons seized from Lindar together with some 700 files obtained from a Customs broker together with a large number of documents in the possession of the Customs Service.

Now, in my view there is simply no doubt that if the Government had been seeking to comply with the mandate of Section 1604, the analysis and presentation to the grand jury could have been completed many months, perhaps almost a year before July 16, 1976, which is the date the indictment was actually returned.

We have in evidence three instances where requests for documents were made by Agent Donohue to the branch of the Customs in charge of retrieving documents and those requests took four months to comply with.

I have inquired about the filing system and under all the circumstances there was no valid reason, why it took four months to comply with those document requests. I don't have any other specific records of times required for other document requests, but I think it is reasonable to infer that the extraordinary length of time taken for getting the documents assembled and analyzed for presentation to the grand jury was unnecessary and could surely have been avoided if the government had been seeking to comply with Section 1604.

Another factor which I have considered is that the documents of defendants which were said to have been in chaotic condition as a result of the seizure were all put in order and specifically inventoried by July 25, 1975. This was done principally by a Customs agent by the name of Dominguez.

All in all, the Government has not in any degree shown valid reason why the necessary documentary materials were not assembled, analyzed and put in whatever form was necessary for use before the grand jury in a far more expeditious fashion than occurred.

The Government has failed to show that the action was taken immediately, forthwith and without delay within the meaning of Section 1604.

Another explanation offered by the Government was that Assistant United States Attorney Bush was involved with other cases and a busy trial schedule. Undoubtedly he was, but his scheduling was arranged on the basis that there was no time mandate of Section 1604. Thus he apparently was inactive on the present case during almost the entire months of November, 1975, December, 1975 through March of 1976, a period of five months.

I have examined also the records of time spent by Agents Donohue and Dominguez on the present matter and again this displays a most leisurely approach to the matter at least in the early months, in contrast to what was really required by Section 1604.

For instance, for the period May 20, 1975 to June 20, 1975, a period of one month, there are no recorded hours spent by either Donohue or Dominguez on the matter. They testified that probably there was some time spent, but at least the records don't display any.

During the summer months, July, August and into September, very little time was spent by these two agents. There are other gaps at other months in the winter where very little time was spent, again indicating an approach which was considerably more leisurely than that mandated by the statute in question.

The real heavy effort in this case did not occur by either the United States Attorney's office or the Customs Service until April 1976. There is no reason that has been shown why this heavy effort of preparation and grand jury but at least the records don't display any.

During the summer months, July, August and into September, very little time was spent by these two agents. There are other gaps at other months in the winter where very little time was spent, again indicating an approach which was considerably more leisurely tha that mandated by the statute in question.

The real heavy effort in this case did not occur by either the United States Attorney's office or the Customs Service until—I'll amend that to take into account some heavy expenditures of time in April 1976 on the part of Agent Donohue, but let's say the starting point of the heavy effort is April 1976. Still there is no reason that has been shown why this heavy effort of preparation and grand jury presentation should not have taken place many months before.

As far as grand jury appearances, I have the chronology of all of those. There were nine grand jury appearances scattered at various times from April 18, 1975 to October 24, 1975. There was not a single grand jury session from October 24, 1975 until May 4, 1976, and then there were 16 grand jury sessions in this case between May 4, 1976 and July 15, 1976.

Again, the heavy effort really started in April and May of 1976.

I have heard and considered various other excuses for delay, particularly a suppression motion which was presented by the defendants in the summer of 1975, and another excuse was the inability to get handwriting exemplars from Giorgio Laurenti until the spring of 1976. Without going into detail, none of these so-called excuses has really turned out, either actually or legally, to provide any justification for long delay in completing the grand jury proceedings and filing the indictment.

I have also considered the argument that the conduct of the defendants has amounted to a waiver of their rights under Section 1604, and I reject these contentions. There was no such waiver at any time. It is true that in 1975 the defendants refrained from taking proceedings under Section 1618 for remission or mitigation of penalties, civil penalties. They did so because they felt this would possibly jeopardize their Fifth Amendment rights, but this did not excuse the Government from full compliance with the mandate of Section 1604 nor did it involve a waiver.

I have also considered the fact that beginning perhaps in May 1976 and for a period of perhaps as much as two months the defense counsel expressly requested the Government to hold up an indictment to see whether a plea bargaining agreement could be arrived at. This is a period of two months at the very end of the time involved here and in my view it does not amount to a waiver of rights under Section 1604.

In my view the proceedings should have been completed long before the May 1976 date, if the Government had known of and considered and been attempting to comply with the mandate of Section 1604.

For the above reasons the indictment is dismissed.

MR. WOHL: May the Government have a stay pending, first, consideration of the possible appeal, and then a decision by the Court of Appeals?

THE COURT: A stay of What?

MR. WOHL: Of the effect of your Honor's decision. I haven't looked at it carefully, but there may be some bail ramifications and they have posted some bail.

THE COURT: I think you have already announced you intend to appeal if you received an adverse ruling. I would expect that. I just don't know enough about the bail situation to comment at the present moment.

MR. JACKSON: May I just say this: The defendants each have posted a cash bail and, as your Honor knows, the basis initially for the making of our motion was the fact that over this extensive period of time we have virtually been out of business. Our clients will need, if you will, the bail money to defend themselves in connection with the appeal. I think we have demonstrated that without regard to any bail our clients have freely entered and left the United States long before there was any question of any arrest or any bail.

THE COURT: Mr. Jackson, I would like to do this:

You heard the ruling and I would like you and Mr. Wohl to discuss the bail situation and if you want to make an application for a reduction of bail or a change in the bail conditions I will have to take that up at another time.

MR. JACKSON: Thank you, your Honor.

MR. OSTROW: Your Honor's opinion is the order of this Court, I take it.

THE COURT: That is right.
